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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

Case No. CR 16 00373-EJD

11 Plaintiff,

REPLY TO UNITED STATES'
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS FOR
VIOLATION OF THE
12 SPEEDY TRIAL ACT

13 v.

14 GOYKO GUSTAV KUBUROVICH and
KRISTEL KUBUROVICH,

Date: August 27, 2018
Time: 3:30 p.m.
Court: Hon. Edward J. Davila

15 Defendants.
16 _____/

17 COMES NOW, defendant, KRISTEL KUBUROVICH, by and through counsel, and
18 submits the following in response to United States Opposition to Defendants' Motion to
19 Dismiss for Violation of the Speedy Trial Act (Doc. # 94), hereinafter referred to as
20 "Opposition."¹

21 **I. THE GOVERNMENT FAILS TO ADDRESS THE CENTRAL ISSUE RAISED**
22 **IN DEFENDANTS' MOTION**

23 The Government's Opposition is nothing but hyperbole and subterfuge. By employing
24 phrases such as "false and misleading argument," "gratuitous yet selective and misleading" and
25 "selectively and deceptively" the Government hopes to avoid having to account for its own
26 _____

27 ¹ The Motion to Dismiss for Violation of the Speedy Trial Act will be referred to as
28 "Motion" (Doc. #s 83 (Notice of Motion and Motion), 83-1 (Memorandum) and 83-2
(Declaration)) and the present brief will be referred to as "Reply."

1 actions.

2 The prosecution fails to offer any explanations for how it is that five months after a
3 continuance was obtained “in order for plea discussions to resume”² the offer was worse than
4 that rejected by both defendants before agreeing to continue the trial. The prosecution also fails
5 to explain how it is that despite needing time to discuss the various proposals with supervisors,
6 once the offers were put in writing, and accepted by the defendants, those supervisors suddenly
7 would not approve.³

8 While the Government may disagree with the defense accusation that they were “plea
9 bargaining in bad faith” this inquiry is left to this Court to determine. Yet, rather than providing
10 information which would aid in this determination, the Government seeks to discredit defense
11 counsel. The prosecution’s characterization the Motion as deceptive in representing the basis
12 for the exclusion of time is frankly unbelievable, as it was the prosecutors themselves who
13 prepared the stipulation in which each “whereas” provides that *additional time was needed* for
14 “discussions” relative to a global resolution short of trial. (See, Doc # 80 at 1:23-2:5.) Only in
15 the last “whereas” paragraph does it not reference the need for time to allow for “discussions”;
16 however, this paragraph addresses the purpose for the requested “schedule,” not the requested
17 continuance. (*Id.* at 2:3-5 (essentially stating that if the trial is continued, this is the new
18 schedule.)⁴)

19
20 ² See Motion, quoting email of March 2, 2018, where in addition to the language
21 quoted, Mr. Simeon contends that he will need time to get approval for a path to resolution
22 following the defendants’ rejection of the previously offered disposition. (Doc. # 83-1 at 6:18-
19.)

23 ³ See Motion, quoting email of March 6, 2018, where in response to Ms. Gilg’s request
24 to keep the pressure on, Mr. Simeon states: “I too would prefer to resolve this sooner than later.
25 Please give me until the end of this week, perhaps the beginning of next week to *finish talking*
26 *with my supervisor about my discussions with you and David, and then get back to you both*
with a proposed resolution.” (Doc. # 83-1 at 8:4-6 (emphasis added).) It is therefore obvious
that the supervisor was involved in the discussions prior to the extension of offers later
retracted.

27 ⁴ While the exclusion of time to September 11th was premised in part on availability of
28 counsel, it was the understanding, that this was the next available trial date. (See, e.g.,
Opposition, Doc. #94 at 3:18-22, citing *United States v. Inostros-Sanchez*, No. 5:17-CR-

1 In the Opposition the Government repeats a particular passage in the Motion to Dismiss
2 which it calls deceptive:

3 The defendants then proceed to selectively - and deceptively - quote the Court's order,
4 ECF 80. *See* ECF 83-1 at 7 (arguing that "[p]ursuant to this Stipulation and Order, the
5 basis for the delay was to allow necessary time [for] 'continuity of counsel' and
6 'effective preparation' *for plea negotiations*" *only*) (emphasis added).

7 (See Doc. # 94 at 2: 5-9.)⁵

8 First, it should be noted that the word "only" is not part of the quote as written in the
9 Motion to Dismiss. (See, Doc. # 83-1 at 7:13-17.) Second, and more importantly, plea
10 negotiations was the *only* reason the defense agreed to the continuance. This is evident not only
11 on the face of the Stipulation and Order wherein all the "whereas" provisions forming the basis
12 of the need for the continuance speak exclusively of plea discussions, but also on the face of
13 the emails which make clear the defense was ready to go to trial and but for representations that
14 the Government was going to attempt to proffer an acceptable resolution - or at least one
15 improved on that which was rejected - the defendants would not stipulate to a continuance.

16 **II. CONTRARY TO THE GOVERNMENT'S ASSERTIONS THE DEFENSE DID**
17 **NOT CAUSE DELAY**

18 Remarkably, rather than address the issues raised by defendants' Motion (e.g., how
19 could discussions with supervisors result in extending offers which after being accepted by
20 defendants were rejected by the supervisors), the Government attempts to shift the blame for
21 the delay on the defense.

22 First, the example presented in the Opposition which ostensibly supports the notion that

23 00203-LHK. The Government's Opposition fails to explain how it is this other case, which had
24 been set for an estimated four day jury trial from June 18-25, 2018 before the Honorable Lucy
25 H. Koh, impacted the scheduling in the present case. (See *Inostros-Sanchez, supra.* at Doc. #
26 10.) Although Mr. Simeon was also the attorney for the Government in *Inostros-Sanchez*, when
27 he appeared on February 14, 2018, the case was set for a change of plea hearing. (*Id.* at Doc. #
28 12.) Subsequently, the defendant pled and the trial date was vacated. (*Id.* at Doc. # 15.)

29 ⁵ Ironically the Government characterizes defendants as being deceptive, however, when
30 they quote from the text of the Stipulation and Order all the "Whereas" provisions are omitted
31 and instead replaced with a "...". (See Opposition, Doc. #94 at 2:8-19.) In fact plea
32 "discussions" are referred to six times in the Stipulation and Order, but the Government omits
33 all references in selecting a portion of the quoted language. (See Doc. # 80.)

1 the defense needed time for “adequate and effective preparation of counsel” and the “mutual
2 schedules and availability of counsel” in truth supports an opposite finding. (See Doc. # 94 at
3 2:20-28.) Because while it is true that in the weeks and month leading up to the March 20,
4 2018 trial date, the attorney for defendant Goyko Kuburovich was unable to appear for many
5 significant hearings, defendant was willing to forego his own attorney’s appearance in order to
6 assure necessary pretrial motions were heard and that such hearing *did not delay the trial date*.

7 Second, the reference to the additional discovery turned over on February 16 and 23 is
8 spurious since the defense made clear no continuance would be requested based on its untimely
9 production.

10 Third, what the Government fails to include about the “suggestion” made by Ms. Gilg
11 regarding filing a motion to continue due to the change in prosecutors is that she clearly stated
12 she would object to such a motion.⁶ Further, time could not be excluded based on the
13 Government counsel’s need to prepare since the Speedy Trial Act explicitly precludes a
14 “continuance for lack of diligent preparation or failure to obtain witnesses on the part of the
15 Attorney for the Government.” (See § 3161(h)(7)(C).) It is evident that the prosecution was
16 scrambling to get ready for trial, as they had not yet produced nearly 3000 documents - some of
17 which would be considered *Brady* material, e.g., interview of attorney Charles Greene FBI 302
18 (Bates 23812). These late disclosures provide additional evidence supporting defendants’
19 position that they were tricked into agreeing to a continuance believing the Government would
20 proceed in good faith to resolve this case, while it is now believed the Government used the

22 ⁶ Although defense counsel does not hold Mr. Simeon responsible for the delay before
23 the trial date was continued as he is the third attorney assigned, the Office as a whole, i.e. the
24 Government, bears this responsibility and the consequences resulting therefrom. The defense
25 understands he was the third prosecutor assigned to this case, and as such, desired a
26 continuance. As Ms. Gilg explained to him, as well as Mr. Lucey, and presented in detail in
27 defense motions filed in this case, because of the long delays prior to their appearance not
28 caused by the defense, as well as the years of pre-indictment delay, she was very concerned
about the stress and anxiety experienced by Ms. Kuburovich and her concern for the health and
well-being of her client made it impossible for her to agree to delay the trial. Defense counsel
accommodated the change of AUSAs where possible by, for example, agreeing to extensions to
file papers and motions hearings. (See, Doc. #s 58, 63 and 64.)

1 ruse of plea negotiations to give them more time to prepare for trial. Again, the defense
2 repeatedly made clear throughout these proceedings that they were prepared to begin trial on
3 the date previously set.

4 Fourth, to represent that Mr. Nick's two week family holiday in July was in any way to
5 blame for the delay is as unfathomable as alleging the nearly 3000 pages turned over on March
6 14th in some way impacted the decision to agree to a continuance on March 2nd.

7 Finally, the Government's attack on the defense and veiled warning to this Court that
8 consideration of the material presented by the defense could be a violation of Fed.R.Crim.P.
9 11(c)(1) ignores the authority cited in defendants' Motion which specifically identifies the
10 "exceptions" to the general rule of prohibited uses of "Compromise Offers and Negotiation"
11 including: "The court may admit this evidence for another purpose, such as negating a
12 contention of undue delay," which would by necessity include the converse of affirming a
13 claim of undue delay. (See Doc. # 83-1 at p. 6 *fn* 4, citing Rule 408(b).) Further, the prohibited
14 use of participation in plea discussions cannot be used "against the defendant," not the
15 Government. (See *Ibid.*, citing Rule 410(a).)

16 ***

17 If there was ever a doubt that the Government was disingenuous in seeking a
18 continuance of the trial, such doubt is put to rest by their Opposition. For the claim that the
19 agreement to continue the trial was made for *any* reason other than to allow the time for plea
20 discussions and approvals is quite simply implausible. Had the prosecutor argued his attempts
21 to finalize the offers extended and accepted were thwarted for understandable reasons, or had
22 one or both of the defendants engaged in conduct which would change the course of the
23 negotiations, an honest dispute would be the subject of this motion. But for the prosecution to
24 claim, contrary to all the evidence proffered in defendants' Motion to Dismiss, that there were
25 other reasons for the continuance is yet another misrepresentation employed to save their case
26 at the expense of these defendants and the truth.

1 **III. LEGAL STANDARDS PRESENTED IN DEFENDANTS’ MOTION ARE**
2 **UNDISPUTED BY THE OPPOSITION.**

3 The Government does not dispute the legal standards and supporting authorities
4 presented in defendant’s Motion. They, however, begin the Opposition by erroneously stating
5 defendants’ “entire motion is premised on ... that the government was plea bargaining in bad
6 faith.” (Doc. # 94 at 1:22-26.) Although the defense maintains the Government did act in bad
7 faith when convincing defendants to agree to a continuance and exclusion of time based on
8 what they believe to be false pretenses,⁷ contrary to the Opposition the *entire* motion is not
9 dependent on this showing.

10 First, as presented in defendants’ moving papers, a Speedy Trial Act violation requires a
11 dismissal independent of the Government’s conduct. (See Doc. # 83-1 at §§ III.A, pp. 11-12
12 and III.C, pp. 14-15.) For example, as was clearly stated in the Motion: “*Aside from*
13 *consideration of the Government’s misconduct*, the delay to allow for ‘continuity of counsel’
14 and ‘effective preparation’ for plea bargaining does not provide a valid basis for an exclusion
15 of time under the Speedy Trial Act.” (See, Doc. #83-1 at 14: 19-22 (citations omitted)
16 (emphasis added).) The Government does not dispute that the Act does not permit exclusions
17 of time solely for plea bargaining. (See, e.g., Doc. # 94 at 1:28-2:4.) Also, the Government
18 does not disagree if an invalid exclusion of time is found and the 70 day speedy trial clock is
19 violated, *18 U.S.C. § 3162(a)(2)* requires a dismissal. (See, e.g., Doc. # 94 at 15:20-23
20 (citations omitted).)

21 Second, in deciding whether to dismiss with or without prejudice the defendants’ did
22 not exclusively rely on arguing the Government’s bad faith conduct. Although defendants
23 maintain this case should be dismissed with prejudice based on this factor alone, their “entire”
24
25

26 ⁷*18 U.S.C. § 3162(b)* prohibits the Government from making “(3) ... a statement for the
27 purpose of obtaining a continuance which he knows to be false and which is material to the
28 granting of the continuance ... or (4) otherwise willfully fail[ing] to proceed to trial without
 justification consistent with section *3161*[.]”

1 Motion was not premised on this argument. Instead, three non-exclusive statutory factors,⁸ as
2 well as any prejudice caused by the delay, were presented for consideration. (See Doc. # 83-1 at
3 § IV., pp. 15-22.) A dismissal with prejudice is the appropriate remedy even in cases where
4 there is no bad faith which caused the delay, but where the Government displayed a
5 lackadaisical attitude, neglect or failed to present an affirmative justification for the delay to
6 warrant a dismissal without prejudice. (*Id.* at 17:21-18:6 (citations and internal quotations
7 omitted).) Moreover, although a showing of bad faith is not a prerequisite for a dismissal with
8 prejudice, if the delay is the result of misconduct or even a pattern of neglect on the part of the
9 Government, a dismissal with prejudice is required. (See Doc. # 83-1 at 17:21-18:11.) While
10 simply responding to defendants' bad faith arguments in its Opposition (see § I, *supra.*), the
11 Government fails to respond to the other factors presented that the Court must consider in
12 deciding this Motion, thus, it can only be presumed they do not dispute these other factors
13 weigh in favor of a dismissal with prejudice.

14 **IV. CONCLUSION**

15 For the reasons set forth herein, and those which may be presented at hearing, it is
16 respectfully requested that this Court grant Defendant's Motion to Dismiss with prejudice.

17 Dated: August 23, 2018

18 Respectfully submitted,

19 /s/ Zenia K. Gilg
20 ZENIA K. GILG
21 Attorney for Defendant
22 KRISTEL KUBUROVICH
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27 ⁸ These factors include: (1) seriousness of the offense, (2) facts and circumstances of the
28 case, including, but not limited to, the length of delay, and (3) impact of reprosecution on the
administration of the speedy trial act and justice. (See Doc. # 83-1 at pp. 16-19.)

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